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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2293/2013*, **

Submitted by:	D and E
Alleged victims:	D and E
State party:	Denmark
Date of communication:	23 October 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 25 October 2013 (not issued in document form)
Date of adoption of decision:	28 March 2017
Subject matter:	Removal of the authors to China
Procedural issues:	Admissibility — manifestly ill-founded; admissibility — *ratione materiae*
Substantive issues:	Cruel, inhuman and degrading treatment or punishment; discrimination; fair trial; non-refoulement; refugee status
Articles of the Covenant:	7, 14 and 26
Articles of the Optional Protocol:	2 and 3

1.1 The authors of the communication are D and E, nationals of China born in 1979 and 1980, respectively, and married to each other. Following the rejection of their application for refugee status in Denmark, they were subject to removal. They asserted that the State party would violate their rights under articles 7, 14 and 26 of the Covenant by removing them to China.[1]

1.2 On 25 October and 2nd November 2013, and on 15 September 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the authors' requests for interim measures to stay their removal to China while the communication was under consideration by the Committee.

* Adopted by the Committee at its 119th session (6-29 March 2017).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Amin Ahmed Fathalla, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.

[1] The Optional Protocol entered into force for Denmark on 23 March 1976.

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The facts as presented by the authors

2.1 In 2005, D arrived in Denmark and obtained work and residence permits. His wife, E, moved to Denmark in 2007. In Copenhagen, the authors met several times with a Falun Gong follower named G, who gave them books written by representatives of the Falun Gong movement. The books contained criticisms of the Chinese regime. Neither of the authors joined the Falun Gong movement. However, E found the books interesting and decided that, during the authors' annual visit to China, she would give a few of them to her parents, who owned a bookstore in a town near the city of Qingdao.

2.2 Thus, when the authors travelled to China in February 2008, E gave two of the books to her parents, who displayed them on a shelf. As a result, on 21 February 2008, police came to the store and arrested E's parents as the store owners. The authors hurried back to Denmark the next day. On 23 February 2008, agents of the Chinese police searched the place where the authors had stayed during their visit, but found nothing of interest. Since then, the authors have not visited China for fear of persecution. D's mother, who has lived in Denmark since August 2008 and returns to China once a year, told the authors that E's parents were still in prison and that their store had closed.

2.3 Shortly after the authors' return to Denmark, D went to see G and recounted the incident in China. They discussed the authors' eligibility for asylum, but G advised that the authors needed to be members of Falun Gong in order to obtain refugee status. The authors did not wish to become members of Falun Gong and thus did not apply for asylum at that time. However, D's work permit expired in the summer of 2012, and the authors, fearing returning to China, felt that their only option was to seek asylum in Denmark.

2.4 The authors filed an asylum application on 2 November 2012; it was denied by the Danish Immigration Service on 14 August 2013. The Immigration Service had rejected the authors' request to hear G as a witness. The authors then appealed the decision to the Refugee Appeals Board. On 7 October 2013, their counsel sent a letter to the Board requesting that G be heard as a witness.

2.5 The authors submit that they have exhausted domestic remedies. On 10 October 2013, the Refugee Appeals Board denied the authors' appeal without hearing G's testimony. Under Danish law, the Board's decision may not be appealed before the Danish courts.

The complaint

3.1 The authors assert that the State party would violate their rights under article 7 of the Covenant by forcibly removing them to China, where they risk being imprisoned and subjected to inhuman or degrading treatment or punishment for having brought into China books on Falun Gong. The authors gave the books to E's parents, who were arrested and imprisoned for having displayed the books in their store.

3.2 The authors claim that the Refugee Appeals Board violated their rights under articles 14 and 26 by denying their written request to call a material witness during the asylum proceedings. The witness, G, could have confirmed that, in 2008, the authors had told him about the incident in China. Thus, his testimony could have favourably affected the credibility assessment performed by the Danish authorities. When an issue concerning credibility can be elucidated by an investigation, the State may not refuse to conduct such an investigation before forming a conclusion on credibility.

State party's observations on the admissibility and merits

4.1 In its observations dated 25 April 2014, the State party adds to the factual background of the communication. It states that D had entered Denmark after having obtained a temporary residence permit on 11 September 2005. Then, E entered Denmark in 2007 with a valid visa and, on 25 October 2007, she was granted a temporary residence permit. On 24 October 2012, agents of the Copenhagen Police encountered the authors in a restaurant where they were working. At that time, they had lost their right to reside in Denmark. Accordingly, they were detained and charged with illegal residence under the Danish Aliens Act. On 26 October 2012, the Danish Immigration Service issued to the

authors an administrative "expulsion order". On 2 November 2012, the authors applied for asylum.

4.2 According to a police report dated 30 October 2012, the authors stated that they were willing to return to China and accepted the administrative expulsion order and two-year re-entry ban, but did not want to confirm this in writing because they did not want to specify the particular city to which they would return until after having conferred with their lawyer. According to a police report dated 1 November 2012, the authors stated that they could not return to China. According to a police report dated 2 November 2012, the authors stated that they wanted to apply for asylum in Denmark. They feared for their lives in China because E had experienced problems with the Chinese authorities after being found in possession of anti-Communist material. According to an asylum registration report dated 5 November 2012, D stated that the Chinese police had found anti-Communist books in E's parents' bookstore, and believed that the authors had brought the books with them from Denmark. According to an asylum registration report dated 6 November 2012, E stated that, when she had visited her parents' bookstore on 21 February 2008, two policemen had entered and had arrested her parents on the ground that some of the books were anti-Communist. E stated that the authors would be imprisoned if they returned to China. In his asylum application dated 7 November 2012, D stated that the couple had brought the books in question from Denmark. In her asylum application dated 7 November 2012, E stated that the police believed that the authors had brought the books from Denmark.

4.3 During his interview with the Danish Immigration Service on 14 May 2013, D stated that, in 2008, he had brought to China three copies of a chapter from a book entitled "Comments on the Communist Party". D also stated that the authors had brought the books to China because they had wanted their families to read them. When confronted with the fact that E had stated that she had brought the texts to China without D's knowledge, D replied that, owing to the passage of time, it was difficult to remember whether it had been D's decision or a joint decision. According to D, after the authors' return to Denmark, E's brother had called and informed them that the police had come to look for the authors because of their connection with the books. When asked why he had waited until 2012 to apply for asylum, D replied that he had been able to stay in Denmark until then with a valid work and residence permit and that G had informed him of the difficulty of obtaining asylum. When asked how he had been able to obtain a renewed Chinese passport in 2009, D stated that he assumed that the Chinese authorities had allowed him to renew his passport so that he could return to China and be arrested.

4.4 In her interview with the Danish Immigration Service on 14 May 2013, E stated that G had given her texts on anti-Communism, Falun Gong and the incident at Tiananmen Square. When visiting her parents in 2008, she had brought several texts with her without informing D. She had informed D, however, that she had given the texts to her parents, who had then been arrested. A few days after the authors' return to Denmark, E's brother had informed E by telephone that the police wanted the authors to return to China so that they could be arrested.

4.5 The State party provides extensive information on domestic asylum procedures.[2] In reaching its determination on the authors' case, the Refugee Appeals Board reasoned that the authors had made inconsistent statements on several matters. For example, D had stated that his parents-in-law had not known that the books were illegal and that he had not warned them about this, but on another occasion had stated that he had in fact warned them of this and had advised them to keep the books at home. D's statement appeared to be adapted to the situation and on several occasions, he had been unable to provide convincing explanations when confronted with inconsistencies. He had given evasive and vague replies to several of the Board's questions, and had no recollection of several crucial issues, including approximately how many times E had spoken to her elder brother about their parents' detention and the year in which she had last spoken with her brother. The authors had also provided conflicting statements concerning several circumstances. For example, according to D's statements to the Immigration Service, he was aware that E had brought to

[2] See communication No. 2379/2014, *Obah Hussein Ahmed v. Denmark*, Views adopted on 7 July 2016, paras. 4.1-4.4.

China the texts on Falun Gong, whereas E had testified that D had not known about the texts and had become angry upon discovering this. The Board deemed it unlikely that the Chinese authorities would have let the authors go after having found the illegal books in E's parents' store. In this respect, the Board noted that the authors' passports had been renewed at the Chinese Embassy in Copenhagen in 2009 and 2010, respectively. The Board further noted that the incident in China had taken place five and a half years ago, and that the authors had not applied for asylum until four and a half years later.

4.6 In response to the authors' request dated 7 October 2013 to summon G for testimony, on 8 October 2013, the secretariat of the Refugee Appeals Board informed the authors' counsel by telephone that G would not be summoned to the Board hearing, but that the Board would determine at the hearing whether he was to be examined if he appeared, and whether he would be summoned if he did not appear of his own volition. At the hearing on 10 October 2013, G did not appear before the Board. On the same date, the Board decided not to adjourn proceedings in order to issue a summons for G, and upheld the decision issued by the Danish Immigration Service. Given its observations on the authors' statements, the Board found that it could not be expected to attach significance, in relation to its credibility assessment, to the potential testimony of G, who had allegedly given the books to the authors. The Board also noted that G had no first-hand knowledge about the events that had taken place in China.

4.7 The authors' claims under articles 7 and 26 are inadmissible due to a lack of substantiation. It has not been established that there are substantial grounds for believing that the authors would risk being subjected to torture or to cruel, inhuman or degrading treatment or punishment if they were returned to China, or that they have been subjected to discrimination. The authors have been treated no differently from any other person applying for asylum.

4.8 The authors' claim under article 14 is inadmissible because it is incompatible with the provisions of the Covenant. Asylum proceedings do not constitute civil rights and obligations and therefore fall outside the scope of article 14.

4.9 The communication is also without merit. The domestic decisions were made on the basis of a comprehensive and thorough examination of the evidence. With the assistance of legal counsel, the authors had an opportunity to present their views to the Refugee Appeals Board, both in writing and orally. Reiterating the reasons mentioned in paragraph 4.6, the State party adds that the authors, who are relatively well-educated, have not plausibly explained why they voluntarily contacted the Chinese authorities in Denmark when they allegedly feared them. D stated during the hearing before the Board that he was not afraid of visiting the Chinese Embassy. The authors also gave inconsistent statements concerning the number of books they had brought to China. During their interviews with the Danish Immigration Service, D stated that he had brought three copies, whereas E stated that they had brought two copies. During their asylum interviews, they each stated that they had brought two copies.

4.10 G did not appear at the Board hearing despite the fact that the authors' counsel had been informed ahead of time that, if he did appear, the Board could determine at the hearing whether he was to be examined. The Board did, however, consider the testimony of D's mother. As opposed to G, D's mother was with the authors during their stay in China in 2008 and was thus able to give first-hand evidence on the authors' grounds for seeking asylum. In response to the authors' assertion that a request for an investigation cannot be denied if it could bear on a credibility assessment, the State party considers that determining the appropriateness of producing witnesses must be left to the relevant domestic authorities.

Authors' comments on the State party's observations

5.1 In submissions dated 30 July and 5 August 2014 and 9 September 2015, the authors maintain that, contrary to the State party's assertion, they did not accept the administrative expulsion order and a two-year re-entry ban. In fact, they did not sign the relevant document for fear that their lives would be endangered upon return to China.

5.2 The authors reiterate their claims regarding the importance of G's testimony and state that G did not appear of his own volition because he was reluctant to do so, given his possible involvement in certain problems that had arisen in China in February 2008.

5.3 The Refugee Appeals Board is not a court and lacks many of the attributes of a court. Its composition and procedures raise fair-trial issues. The alleged inconsistencies raised by the Board concerning the authors' statements are not convincing. The authors provided coherent explanations of the relevant facts. It is not suspicious that the authors contacted the Chinese embassy in Denmark in 2009 and 2010 to have their expired passports renewed. The Chinese authorities already knew they were in Denmark and would in any case need to wait for the authors to return to China in order to punish them.

5.4 On 24 October 2012, D was charged for staying in Denmark unlawfully and detained. On 26 October, the authors' asylum application was denied. On 29 October, the charges against D were dropped because it had been determined that, on 24 October, he had in fact been lawfully present in Denmark. On 27 January 2014, D received compensation from the State party for wrongful detention.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol.

6.2 The Committee notes, as required by article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined and has not been examined under any other procedure of international investigation or settlement.

6.3 The Committee notes the authors' claim that they have exhausted all effective domestic remedies available to them. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee notes the authors' claims that they would face ill-treatment and imprisonment if they were removed to China, owing to their association with Falun Gong literature that they had given to E's parents, who were subsequently arrested. The Committee also notes the authors' claim that a material witness, G, was not allowed to testify before the Refugee Appeals Board to corroborate certain elements of the authors' claims. The Committee also takes note of the State party's observations that the authors' claims under articles 7 and 26 are unsubstantiated, and that article 14 does not apply to asylum proceedings.

6.5 The Committee recalls paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant.[3] The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.[4] Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.[5] The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in

[3] See communication No. 2357/2014, *A. v. Denmark*, decision of inadmissibility adopted on 30 March 2016, para. 7.4.

[4] See, inter alia, communication No. 2291/2013, *A. and B. v. Denmark*, Views adopted on 13 July 2016, para. 8.3.

[5] See, inter alia, ibid.; and communications No. 2474/2014, *X v. Norway*, Views adopted on 5 November 2015; para. 7.3; and No. 2366/2014, *X. v. Canada*, Views adopted on 5 November 2015, para. 9.3.

order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.[6]

6.6 The Committee notes that the Refugee Appeals Board pointed to contradictions in the authors' statements and found that the authors were not credible as to the risk of harm they had alleged they faced in China. Furthermore, the authors have not provided evidence that E's parents were detained owing to their association with the Falun Gong literature found at their shop. The Committee considers that, while the authors disagree with the factual conclusions of the State party's authorities, the information before the Committee does not indicate that those findings are manifestly unreasonable.[7] The Committee considers that the authors have not established a sufficient basis for their claim that the evaluation of their asylum application by the Danish authorities was clearly arbitrary or amounted to a denial of justice.[8] Accordingly, the authors' claims under article 7 of the Covenant are insufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee also notes that the authors have not explained the basis of their claim under article 26 of the Covenant, that is, why they felt that they had received discriminatory treatment during the procedure before the Refugee Appeals Board. The Committee therefore considers that the authors' claims under article 26 of the Covenant are insufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

6.8 Regarding the authors' claims under article 14 of the Covenant that the Refugee Appeals Board lacks the attributes of a judicial court and that G was unfairly denied the opportunity to testify, the Committee refers to its jurisprudence that proceedings relating to aliens' expulsion do not fall within the ambit of a determination of "rights and obligations in a suit at law" within the meaning of article 14 (1) but are governed by article 13 of the Covenant.[9] Furthermore, the latter provision offers to asylum seekers some of the protection afforded under article 14 of the Covenant, but not the right of appeal to judicial courts.[10] The Committee therefore concludes that this claim is inadmissible *ratione materiae* under article 3 of the Optional Protocol. The Committee also considers that, even if the authors had invoked article 13 of the Covenant, their claims on this issue would be insufficiently substantiated.

6.9 The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That the present decision should be transmitted to the State party and to the authors

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[6] See, inter alia, communications No. 2559/2015, *I.M.Y. v. Denmark*, decision of inadmissibility adopted on 14 July 2016, para. 7.6; and No. 2393/2014, *K. v. Denmark*, Views adopted on 16 July 2015, para. 7.4.

[7] See communication No. 2351/2014, *R.G. et al. v. Denmark*, decision of inadmissibility adopted on 2 November 2015, para. 7.7.

[8] See, inter alia, *A. v. Denmark* (see footnote 3 above), para. 7.4.

[9] See, inter alia, *A. and B v. Denmark* (see footnote 4 above), para. 7.3; and communication No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 8.5.

[10] See communication No. 2288/2013, *Osayi Omo-Amenaghawon v. Denmark*, Views adopted on 23 July 2015, para. 6.4; general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 17 and 62.